169

(1) Supreme Court, U.S.
FILED

No. 10-256

AUG 20 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD LEE MELLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD LEE MELLOR
2175 Stratford Drive
Marion, Iowa 52302
Pro Se

QUESTIONS PRESENTED FOR REVIEW

Can a Citizen of the United States of America be indicted without a Summary Record of Assessment presented to the Grand Jury to show proof of an assessment when a tax return was filed? How can an Appellate Court Panel rule against the Petitioner when two (2) Appellate Courts have ruled in favor of the Petitioner?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are:

RICHARD LEE MELLOR, an individual, on behalf of himself; THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED IN THE CASE	1
STATEMENT OF THE FACTS	1
STATEMENT OF THE ISSUES	2
STATEMENT OF RELIEF SOUGHT BY PETITIONER	2
REASONS WHY THE WRIT SHOULD ISSUE	3
CONCLUSION	12

APPENDIX

Per Curiam Opinion of the United States Court of Appeals for the Eighth Circuit In Re: U.S. v. Mellor No. (09-3256) ..... App. 1

Judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court of Iowa – Cedar Rapids In Re: to U.S. v. Mellor No. (1:08-cr-00049-LRR-1) ..... App. 4

TABLE OF CONTENTS – Continued

Page

Order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's rehearing en banc In Re: U.S. v. Mellor No. (09-3256) ..... App. 6

TABLE OF AUTHORITIES

Page

CASES

Banks v. United States, 204 F.2d 666, re-affirmed 223 F.2d 884 (8th Cir. 1953) 4, 9

Clark v. U.S., 63 F.3d 83 (1st Cir. 1995) 10

Geiselman v. U.S., 961 F.2d 1 (1st Cir. 1992) 4, 8

Gentry v. U.S., 962 F.2d 555 (6th Cir. 1992).....4

Government of Virgin Islands v. Greenidge, 600 F.2d 437 (3rd Cir. 1979) 6

Hinsley v. Boudloche, 201 F.3d 638 (5th Cir. 2000) 10

Honea v. United States, 344 F.2d 798 (5th Cir. 1965) 6

Howell v. U.S., 164 F.3d 523 (10th Cir. 1998).....4

Huff v. U.S., 10 F.3d 1440 (9th Cir. 1993).....4, 10

In re: First T.D. & Investment, Inc., Neilson v. Chang, 253 F.3d 520 (9th Cir. 2001).....10

In re Galletti, 298 F.3d 1107 (9th Cir. 2002).....10

Johnson v. U.S., 123 F.3d 700 (2nd Cir. 1997) 4, 10

Johnson v. U.S., 990 F.2d 41 (2nd Cir. 1993) 4

King v. Ames, 179 F.3d 370 (5th Cir. 1999).....10

Knieriem v. Group Health Plan, Inc., 434 F.3d 1058 (8th Cir. 2006) 10

Koon v. U.S., 518 U.S. 81, 116 S.Ct. 2035 (1996).....7

TABLE OF AUTHORITIES – Continued

Page

Lowery v. Texas A & M Univ. Sys., 117 F.3d 242 (5th Cir. 1997) 10

McAuley v. Federal Ins. Co., 500 F.3d 784 (8th Cir. 2007) 10

Merritt-Campbell, Inc. v. RxP Prods., Inc., 164 F.3d 957 (5th Cir. 1999) 10

O'Bryant v. U.S., 49 F.3d 340 (7th Cir. 1995) 10

Perez v. U.S., 312 F.3d 191 (5th Cir. 2002) 10

Riley v. Dorton, 93 F.3d 113 (4th Cir. 1996) 10

Sansone v. United States, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965) 9

Stallard v. U.S., 12 F.3d 489 (5th Cir. 1994) 4

Stirone v. U.S., 361 U.S. 212 (1960) 5

U.S. v. Cabrero-Teran, 168 F.3d 141 (5th Cir. 1999) 5, 6

U.S. v. Castro, 129 F.3d 226 (1st Cir. 1997) 7

U.S. v. England, 347 F.2d 425 (7th Cir. 1965) 4, 9

U.S. v. Guzman-Ocampo, 236 F.3d 233 (5th Cir. 2000) 6

U.S. v. Miller, 161 F.3d 977 (6th Cir. 1998) 6

United States v. Dack, 747 F.2d 1172 (7th Cir. 1984) 8

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 269 (1954) 4, 5

United States v. Gustafson, 528 F.3d 587 (8th Cir. 2008) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Title 26 U.S.C. § 7201 ..... 8, 9

Title 28 U.S.C. § 1254 1

OTHER AUTHORITIES

Fifth Amendment of the U.S. Constitution 1

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Petitioner filed a Brief (# 09-3256) in the Eighth Circuit Court of Appeals, which was denied April 27th 2010.

Petitioner filed an En Banc Hearing (# 09-3256) in the Eighth Circuit Court of Appeals, which was denied June 4th, 2010.

JURISDICTION

A timely Petition for Re-Hearing was filed in the Eighth Circuit Court of Appeals and was denied on June 4th, 2010. This Honorable Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fifth Amendment of the Constitution of the United States of America:

> . . . nor be deprived of . . . liberty . . . without due process of law . . .

STATEMENT OF THE FACTS

The Petitioner was allegedly indicted by a Federal Grand Jury on six (6) counts of violating the criminal sections of the Internal Revenue Code. In

order to allege an IRS criminal offense, there must be an official income tax liability based on IRS procedures that create an income tax liability including an official tax assessment record or IRS Form 4340.

There Is No Criminal Offense Without A Proper Income Tax Assessment Record.

STATEMENT OF THE ISSUES

1.) Whether the District Court erred in ruling that denying Petitioner's Motion to Dismiss the Indictment for the reason that the Grand Jury did not receive the official assessment records when tax returns were filed prior to the Grand Jury indictment is an abuse of discretion.

2.) Whether Petitioner's rights under the 5th Amendment due process of law and equal protection of the law have been violated and whether relief needs to be granted.

STATEMENT OF RELIEF SOUGHT BY PETITIONER

By this Petition for Writ of Certiorari, Petitioner seeks an order from this Honorable Appellate Court for nothing more than to Order the Appellate Court

to perform its duty under the Constitution, reversing the said order of the Appellate Court and taking judicial notice that the Assessment records of the Petitioner were not given to the Grand Jury in violation of the law.

REASONS WHY THE WRIT SHOULD ISSUE

The Petitioner was allegedly indicted by a Federal Grand Jury on six (6) counts of violating the criminal sections of the Internal Revenue Code. In order to allege an IRS criminal offense, there must be an official income tax liability based on IRS procedures that create an income tax liability.

There Is No Criminal Offense Without A Proper Income Tax Assessment Record.

Counts I thru VI of the Mellor Indictment are defective because of the missing legal and fact elements, that being that no taxes are due and owing at the time of the indictment because the IRS has not legally or actually assessed an income tax on Form 4340 prior to the Grand Jury concurring on said indictment which is required under the statute with support of court decisions. **The IRS has no evidence of even a civil liability.** The IRS must furnish the Grand Jury the legal and proper Form 4340 assessments to have evidence of a tax liability due and owing according the following Federal Appellate Court cases, to wit:

> *Banks v. United States*, 204 F.2d 666 (8th Cir. 1953); *Gentry v. U.S.*, 962 F.2d 555 (6th Cir. 1992); *Johnson v. U.S.*, 990 F.2d 41 (2nd Cir. 1993); *Huff v. U.S.*, 10 F.3d 1440 (9th Cir. 1993); *Geiselman v. U.S.*, 961 F.2d 1 (1st Cir. 1992); *Johnson v. U.S.*, 123 F.3d 700 (2nd Cir. 1997); *Stallard v. U.S.*, 12 F.3d 489 (5th Cir. 1992) *Howell v. U.S.*, 164 F.3d 523 (10th Cir. 1998).

The government did not scrupulously observe rules or procedures which it has established; this case against the Petitioner should be struck down and this case dismissed under the *Accardi* Doctrine.

The taxpayer in this instant case filed tax returns, which is not in dispute. There are court cases that upheld the right to have a valid tax assessment record before a person could be charged criminally where the *taxpayer had filed a tax return*.

> " . . . under no circumstances may the trial court usurp this right (valid tax assessment) by ruling as a matter of law on an essential element of the crime charged." *U.S. v. England*, 347 F.2d 425 (7th Cir. 1965) (Explanation added.)

> "There is no doubt that a valid assessment, and proof thereof, was an essential element of the case against Appellants." *Banks v. United States*, supra, reaffirmed 223 F.2d 884; *U.S. v. England*, supra.

Again, the IRS had never issued a certified individual or company tax assessment record on a form 4340 and including a Form 2866 – Certificate of

Official Record concerning the Petitioner at the time of the indictment. This omission of an essential legal and fact element results in no federal income tax liability. Therefore, there could never exist a criminal federal income tax liability giving jurisdiction to the U.S. District Court.

The denial of this Petitioner's Motion to Dismiss under the *Accardi* Doctrine is beyond the District Judge's power and inconsistent with accepted principles and usages of law. The "*Accardi* Doctrine" was established by the U.S. Supreme Court in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 269 (1954). Several courts have upheld the *Accardi* Doctrine since 1954 making it an accepted principle of law with extended usage in many applications.

An indictment must contain all of the elements of the offense. *Stirone v. U.S.*, 361 U.S. 212 at 218. To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense. *U.S. v. Cabrero-Teran*, 168 F.3d 141 (5th Cir. 1999). To guarantee the right to be tried only after indictment, the Grand Jury must consider and find evidence supporting all of the crime's elements. *U.S. Cabrera-Teran*, supra.

The Mellor indictment did not contain all of the elements of the offense; therefore, the Petitioner could not be charged with an offense. In addition, the Grand Jury could not have considered and found evidence supporting each count because key evidence

was withheld and the wrong legal standards were used by the Grand Jury.

In *Honea v. United States*, 344 F.2d 798, 803-04 (5th Cir. 1965):. . . ."it is not enough that defendant should be prosecuted for violating a particular statute; rather, the indictment must also allege every element of the offense. Only in this way is any assurance furnished that the grand jury found probable cause to believe the defendant in fact committed acts constituting the offense in question." "The failure of indictment to allege all elements of the offense *may not* be cured by evidence or instructions at trial, nor by. . . . a bill of particulars, and the indictment may not be actually or constructively amended by adding material allegations to the offense charged or of another offense."

To be sufficient, an indictment must allege each element of the offense; if it does not, it fails to charge that offense. *U.S. v. Cabrera-Teran*, supra; *U.S. v. Guzman-Ocampo*, 236 F.3d 233 at 236 (5th Cir. 2000).

Petitioner in this instant case was charged with crimes that do not exist under the introduction and statutes cited in the indictment and therefore, all counts are fatally defective. A crime charged without an element is not an existing valid crime. *U.S. v. Miller*, 161 F.3d 977 at 982 (6th Cir. 1998); *Government of Virgin Islands v. Greenidge*, 600 F.2d 437 at 439, note 2 (3rd Cir. 1979).

It is never within the discretion of the prosecutor, Grand Jury or the court to make determinations premised on incorrect legal standards. *Koon v. U.S.*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *U.S. v. Castro*, 129 F.3d 226 (1st Cir. 1997). Therefore, Counts I thru VI must be ruled to be null and void.

The Assessment was done in February of 2009 and the Grand Jury convened in 2008. The Form 4340 Assessment could not have been presented to the Grand Jury in October because it was not produced until February of 2009.

Counts I thru VI are missing the legal and fact elements that before a tax liability can be due and owing on any income received, an official certified tax assessment certificate must be prepared by the IRS which is a Form 4340. Neither the IRS nor the government had given the Form 4340's for the tax years involved in Counts I thru VI to the Grand Jury. However, the incomplete 4340 assessment with no Form 2866 was presented as evidence at trial in March of 2009. The 4340 assessment was dated February of 2009 – months after the Grand Jury indictment. Therefore, the evidence the prosecutor presented at trial is proof that the 4340 assessment was not given to the Grand Jury which would be a fatal missing element and a due process violation of this taxpayer. Thus, the Grand Jury never was presented any Form 4340's and could not find probable cause to indict the Petitioner in this case.

Although the Honorable three (3) Judge Panel did not comment on the reasons or basis in ruling

against Petitioner Mellor, it is reasonable to assume that they apparently agreed with the government and IRS that at least one (1) Appellate case is controlling in this instant case. Again, the issue is whether the IRS must issue a tax assessment in order to meet its burden under section 7201 of proving the existence of a tax deficiency.

The one (1) case quoted by the government and the IRS is:

1.) *United States v. Gustafson*, 528 F.3d 587, (8th Cir. 2008)

This case does not support the government's and IRS's and Appellate Court's position that a tax assessment, in order to meet its burden under section 7201 of proving the existence of a tax deficiency, is not necessary. The Honorable Appellate Court misread the *Gustafson* case in their delivery of the judgment in the Government's favor. In *Gustafson*, supra; the same Eighth Circuit Court of Appeals case states specifically that "When a taxpayer **fails to file a return [emphasis added]** and then refuses to provide relevant information to the IRS, the agency . . . is not compelled to file a substitute return to trigger the assessment process. See *Geiselman v. United States*, supra. Indeed, it is not even compelled to make a formal assessment **when no return is filed, [emphasis added]** because any deficiency is deemed to arise by operation of law on the date a return should have been filed. See *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984)."

In the instant *Mellor* case, the Petitioner amended and filed his proper tax returns **one and one-half years prior** to his indictment and as the Seventh Circuit in *U.S. v. England*, 347 F.2d 425 (7th Cir. 1965) citing the Eighth Circuit *Banks*, case stated, "a valid assessment, and proof thereof, was an essential element of the case against appellants." For this proposition, we relied on the case of *Banks v. United States*, 204 F.2d 666 (8th Cir. 1953), and the statement of the Government attorney at the trial in this cause to the effect that, "We have to show there was an assessment, a legal assessment." That the existence of an outstanding tax liability is an essential element of a crime under Section 7201 of the Internal Revenue Code of 1954 was recently reiterated in *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965). There, the Supreme Court said:

> "As has been held by this Court, the elements of §7201 are willfulness; the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax." (Citations omitted.) (Emphasis added.)

The brunt of the Court's opinion in this cause is that, "in the criminal prosecution of one charged with the commission of a felony, the defendant has an absolute right to jury determination upon all essential elements of the offense." *U.S. v. England*, supra.

This question must be answered by the United States Supreme Court because they are of exceptional importance to the Eighth Circuit and the entire nation.

The Honorable Eighth Circuit Panel states that it considered the record in this case concerning *Mellor's* appeal without comment of the complex legal issues. This does not appear to be a de novo review.

Mellor would suggest that a de novo review would result in much more commentary and a reversal of the panel's and entire Court's decision.

The Appellate Court reviews an order disposing of a case on the pleadings de novo. *McAuley v. Federal Ins. Co.*, 500 F.3d 784 (8th Cir. 2007); *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1060 (8th Cir. 2006); *Lowery v. Texas A & M Univ. Sys.*, 117 F.3d 242 at 246 (5th Cir. 1997). A review of a district court's decision on an appeal from a bankruptcy court is a de novo review. *In re: First T.D. & Investment, Inc., Neilson v. Chang*, 253 F.3d 520 at 526 (9th Cir. 2001); *In re Galletti*, 298 F.3d 1107 (9th Cir. 2002). We review a grant of summary judgment de novo, *King v. Ames*, 179 F.3d 370 at 373 (5th Cir. 1999) citing *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999); *Hinsley v. Boudloche*, 201 F.3d 638 (5th Cir. 2000); *Johnson v. U.S., By and Through Dept. of Treas.*, 123 F.3d 700 (2nd Cir. 1997); *Huff v. U.S.*, 10 F.3d 1440 (9th Cir. 1993); *Perez v. U.S.*, 312 F.3d 191 (5th Cir. 2002); *Riley v. Dorton*, 93 F.3d 113 at 115 (4th Cir. 1996); *Clark v. U.S.*, 63 F.3d 83 (1st Cir. 1995); *O'Bryant v. U.S.*, 49 F.3d 340 (7th Cir. 1995).

Apparently, the Eighth Circuit and other circuits traditionally do a de novo review of a summary

judgment. The question is why a de novo review was not accomplished in this case.

This case demands a complete de novo review with proper findings of fact and conclusions of law from a panel.

The U.S. Supreme Court must consider this case because –

1.) This is a conflicting decision between the Circuit Courts. (Seventh and Eighth Circuits)

2.) This is a conflicting decision in the Eighth Circuit. A previous panel ruled in favor that a tax assessment record was required. The *Mellor* panel ruled against the fact that a tax assessment was required under the law.

CONCLUSION

WHEREFORE, IT IS Prayed that this Honorable Supreme Court enter an Order to dismiss this case and allow this Petitioner's Due Process to be upheld.

The Petitioner also requests that Findings of Fact and Conclusions of Law be included with any and all rulings on the above rulings or request.

Respectfully submitted,

RICHARD LEE MELLOR
2175 Stratford Drive
Marion, Iowa 52302
Pro Se

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-3256

United States of America, Appellee, v. Richard Lee Mellor, Appellant.	* * * * * *	Appeal from the United States District Court for the Northern District of Iowa. [UNPUBLISHED]

Submitted: April 22, 2010
Filed: April 27, 2010

Before WOLLMAN, COLLOTON, and GRUENDER, Circuit Judges.

PER CURIAM.

Richard Mellor appeals pro se the district court's[1] judgment, entered after a jury found him guilty of knowingly presenting to the Internal Revenue Service (IRS) a false claim by filing a return for the 2002 tax

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[1] The Honorable Linda R. Reade. Chief Judge, United States District Court for the Northern District of Iowa.

year claiming a refund of $240,008.79, in violation of 18 U.S.C. § 287 (Count 1); willfully attempting to evade income tax due by failing to file income tax returns and attempting to conceal his income for 2002, 2003, 2004, and 2005, in violation of 26 U.S.C. § 7201 (Counts 2-5); and attempting to obstruct the administration of internal revenue laws, in violation of 26 U.S.C. § 7212(a) (Count 6). For the reasons that follow, we affirm.

We reject Mellor's argument that the willful-blindness jury instruction constructively amended Count 1 as it was charged in the indictment. *See United States v. Gill,* 513 F.3d 836, 849 (8th Cir. 2008) (jury instructions constructively amend indictment if they so modify essential elements of charged offense that they allow jury to convict defendant of offense other than one charged in indictment). The jury instructions listed the elements of the false-claim offense, including that Mellor must have known the claim was false, fictitious, or fraudulent; and the willful-blindness instruction merely provided a means of inferring that knowledge. *See United States v. Aleman,* 548 F.3d 1158, 1166 (8th Cir. 2008) (willful-blindness instruction is proper if evidence supports inference that defendant was aware of high probability of existence of fact in question and purposely contrived to avoid learning facts in order to have defense), *cert. denied,* 129 S. Ct. 2756 (2009).

We further hold that the district court did not err in denying Mellor's motion to dismiss the indictment based on a change in the date he was alleged to have

committed the Count 1 offense, because we conclude that the modified date did not constitute a constructive amendment of the indictment. The original and modified dates – for each of which a range was given – were within two weeks of each other, and both clearly referred to the same offense. *See, United States v. Harris,* 344 F.3d 803, 804-05 (8th Cir. 2003) (per curiam) (reversible constructive amendment occurs if evidence used modified essential elements of offense; no error in district court's finding of guilt on or about date other than date charged in indictment, as date was "reasonably near" date alleged).

Finally, this court has previously rejected the contention that the IRS must issue a tax assessment in order to meet its burden under section 7201 of proving the existence of a tax deficiency. *See United States v. Gustafson,* 528 F.3d 587, 593 (8th Cir. 2008).

Accordingly, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-3256

United States of America,

Plaintiff-Appellee

v.

Richard Lee Mellor,

Defendant-Appellant

Appeal from U.S. District Court for the
Northern District of Iowa – Cedar Rapids
(1:08-cr-00049-LRR-1)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 27, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-3256

United States of America,

Appellee

v.

Richard Lee Mellor,

Appellant

Appeal from U.S. District Court for the
Northern District of Iowa – Cedar Rapids
(1:08-cr-00049-LRR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 04, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans